

Letter(s) of Findings Number(s): 04-20120239; 02-20120409; 03-20120410
Sales and Use Tax; Withholding Tax; Income Tax
For Tax Years 2008-10

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ISSUES

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the imposition of sales and use tax.

II. Withholding Tax—Imposition.

Authority: IC § 6-8.1-5-1; [45 IAC 3.1-1-97](#).

Taxpayer protests the imposition of withholding tax.

III. Income Tax—Imposition.

Authority: IC § 6-8.1-5-1; [45 IAC 3.1-1-66](#).

Taxpayer protests the imposition of income tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business which operates two convenience stores which also sell gasoline. As the result of three simultaneous audits covering the tax years 2008, 2009, and 2010, the Indiana Department of Revenue ("Department") determined that Taxpayer had not reported the correct amount of sales and use tax, withholding tax, and income tax. The Department therefore issued proposed assessments for sales, use, withholding, and income taxes. Taxpayer filed a protest of sales and use tax. An administrative hearing was held regarding the sales and use tax protest. During the administrative hearing, Taxpayer also discussed the fact that it was protesting the withholding and income tax assessments. The Hearing Officer requested Taxpayer to submit a written form of their protest. Taxpayer sent in a protest letter for withholding and income taxes, along with some supporting documentation for the sales and use tax protest. These Letters of Findings (04-20120239 for sales and use, 02-20120409 for income, and 03-20120410 for withholding) result. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of sales and use tax for the tax years 2008-10. Taxpayer believes that the Department did not take certain factors into account when determining Taxpayer's collection and remittance duties and that the liability calculations are incorrect. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as required by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. Regarding the collection of sales tax, Taxpayer is the retail merchant and collects the tax as agent for the state. The Department determined that Taxpayer had not collected and remitted the proper amount of sales tax for these years. Also, regarding use tax, the Department determined that Taxpayer had acquired tangible personal property in retail transactions and used that property in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for use tax, as provided by [45 IAC 2.2-3-4](#).

At the hearing, Taxpayer stated that the Department did not take certain factors into consideration when calculating the amount of sales and use tax due. Those factors included: theft, spoilage, and expired products. The Department requested additional documentation and analysis to support this position.

After review of the materials submitted by Taxpayer in support of its protest, the Department finds that these materials are not sufficient to establish Taxpayer's position. When reviewing sales tax compliance, the Department naturally looks to a retail merchant's sales documents. In this case, Taxpayer was unable to supply sales documents at both the audit and protest level. Instead, Taxpayer was only able to supply incomplete documentation of some thefts, some hand-written accounts of expired product, and some of Taxpayer's own calculations of how it arrived at the conclusion that it should be entitled to a nineteen percent reduction of the Department's sales calculations.

Taxpayer's documentation is incomplete and is not related to sales at the stores. Taxpayer has not established that the proposed assessments are wrong. Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. Withholding Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of withholding tax for the tax years 2008-10. The Department based its proposed assessments on the grounds that the W-2 and WH-3 forms provided by Taxpayer did not include sufficient employees and hours to operate two convenience stores which were each open twenty-four hours a day. The Department also noted that Taxpayer did not issue any 1099 miscellaneous forms showing non-employee compensation. The Department consulted a well-known data source known as "Bizstats.com" to determine the average number of employees and the number of hours worked by those employees for two convenience stores of this type which were open twenty-four hours a day. After finding those numbers, the Department recalculated the amount which Taxpayer should have withheld and subtracted the amount which Taxpayer was able to verify it actually withheld. What was left was considered as the amount under-withheld by Taxpayer.

The relevant regulation is [45 IAC 3.1-1-97](#), which states in relevant part:

Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.

Therefore, employers such as Taxpayer are required to withhold adjusted gross and county adjusted gross income tax from payments of wages made to its employees.

Taxpayer protests that the Department erred in not considering that Taxpayer is a subchapter S corporation and that all profit and losses flow through to the business owners. Taxpayer also states that the major problem is that it cannot re-issue W-2s for the years at issue. Taxpayer does not make any reference to any statute, regulation, or court case which explains why this is relevant. Taxpayer has not met the burden imposed by IC§ 6-8.1-5-1(c) of proving the proposed assessments wrong.

FINDING

Taxpayer's protest is denied.

III. Income Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of individual income tax on the owners of the S corporation which owned the two convenience stores operated by Taxpayer. Taxpayer states that the Department did not take into account three expense items which were managed by a landlord and that those amounts did not flow through the business checking account. Taxpayer provided documentation in support of this position.

The Department notes that the audit in question is an income tax audit of Taxpayer and that there are no proposed assessments for Taxpayer since Taxpayer is an S corporation. The audit in question merely explains the Department's audit methods and results for Taxpayer. The Department refers to [45 IAC 3.1-1-66](#), which states:

Subchapter S Corporations. Corporations electing Subchapter S status under Internal Revenue Code §1372 and which comply with the withholding requirements of [IC 6-3-4-13](#) are exempt from adjusted gross and supplemental net income tax on all income except capital gains subject to tax under Internal Revenue Code §1378. This exemption is effective until the corporation's shareholders terminate the election with the Internal Revenue Service or until the corporation engages in transactions which disqualify it from Subchapter S status. A complete or partial corporate liquidation or the intent to dissolve will not in itself terminate the election.

Subchapter S corporation shareholders are taxed on their distributive shares of income at the individual income tax rate. The character of the income (as capital gains or ordinary income) also passes through to the shareholders.

Although Subchapter S corporations are generally not subject to adjusted gross income tax, they are subject

to use tax and intangibles tax, and must report and pay such tax at the time the annual return is filed. Subchapter S corporations must also withhold adjusted gross income tax on any nonresident shareholder's share of corporate income.

Regarding the Department's audit of Taxpayer, Taxpayer states that the Department did not take into account such factors as: rents, repairs, and merchant credit card fees. Taxpayer also states that the Department did not allow a credit for amounts paid to the Indiana lottery to pay for lottery tickets which were stolen by a night employee. After a review of the audit report, the Department finds that the audit did in fact deduct rents as claimed on Taxpayer's income tax returns for the relevant years. The fact that Taxpayer had a lease agreement for more than it reported in rental payments is not convincing. Taxpayer has not provided any documentation to establish that it actually paid the amounts on the lease. In the absence of any contradicting documentation, it is reasonable for the Department to use the amounts which Taxpayer itself reported on its own returns. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) of proving the proposed assessments wrong.

Next, Taxpayer states that the landlord charged it for repairs to the facilities at the two convenience stores in question. Taxpayer provided no documentation to establish that it paid such charges. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) of proving the proposed assessments wrong.

Next, Taxpayer states that the landlord kept a certain percentage of merchant credit card fees and that those amounts should be removed from the Department's taxable income calculations. After a review of the documentation submitted by Taxpayer, the Department is unable to agree with Taxpayer's conclusion. While there is a list of credit card fees, it is not clear to whom they are attributable. In the absence of fully explanatory documentation and analysis, the Department finds that Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) of proving the proposed assessments wrong.

Finally, Taxpayer protests that the Department should remove certain amounts paid to the Indiana Lottery. Taxpayer states that these amounts were payments to the Lottery for lottery tickets which were stolen by a night employee. A review of the documentation submitted does show payments to the Indiana Lottery. What the documentation does not show is why those payments were made. Taxpayer states that, due to security camera issues, the county prosecutor did not press charges against the employee in question; therefore there is no record to show that the tickets were stolen. In the absence of any verifying or explanatory documentation, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) of proving the proposed assessments wrong.

In conclusion, Taxpayer has not provided sufficient documentation to establish any of its points of protest. Taxpayer invites the Department to reduce the income tax calculations without verification. The Department declines this invitation. Also, the Department reiterates that the audit investigation only addresses the income tax calculations for Taxpayer. Neither the investigation nor this Letter of Findings addresses the S corporation's shareholders or their individual income taxes. Those liabilities, if any, must be addressed on a separate basis.

FINDING

Taxpayer's protest is denied.

SUMMARY

Taxpayer's protest in Issue I regarding sales and use tax is denied. Taxpayer's protest in Issue II regarding withholding tax is denied. Taxpayer's protest in Issue III regarding income tax is denied.

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